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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 69-5027

ERNEST JAMES AIKENS, *Jr., Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 69-5030

LUCIOUS JACKSON, *Petitioner,*

v.

STATE OF GEORGIA, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 69-5003

WILLIAM HENRY FURMAN, *Petitioner,*

v.

STATE OF GEORGIA, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 69-5031

ELMER BRANCH, *Petitioner,*

v.

STATE OF TEXAS, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

TION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF CI CURIAE OF THE NATIONAL ASSOCIATION FOR THE ADVANCE- T OF COLORED PEOPLE, NATIONAL URBAN LEAGUE, SOUTHERN ISTIAN LEADERSHIP CONFERENCE, MEXICAN-AMERICAN LEGAL ENSE AND EDUCATIONAL FUND, AND THE NATIONAL COUNCIL OF NEGRO WOMEN

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Motion for Leave to File Brief Amici Curiae

The National Association for the Advancement of Colored People, the National Urban League, The Southern Christian Leadership Conference, the Mexican-American Legal Defense and Educational Fund, and the National Council of Negro Women, respectfully move the court for leave to file the attached brief amici curiae. The attorneys for the petitioners have consented to the filing, but except for the State of California, the attorneys for the respondent have refused.

Movants have never before asked leave of this court to file an amicus brief on previously presented aspects of the administration of capital punishment. We do so now because the decision of the court will have an unprecedented impact on the manner in which the death penalty is imposed upon the downtrodden and deprived minorities of this country, who too often are black.

Counsel for the Petitioners have covered admirably, we think, the aspects of the case which deals with fundamental violations of the Eighth and Fourteenth Amendments. While we are deeply concerned with those issues, we shall, to avoid repetition, treat principally the areas that bear with discriminatory harshness upon blacks, Mexican-Americans, the poor and other disadvantaged persons.

WHEREFORE, movants pray that the attached brief amici riae be permitted to be filed with the Court.

Respectfully submitted,

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BRIEF OF AMICI CURIAE

Statement of Interest

This brief amici curiae is tendered by five national civil rights organizations which work to obtain, protect, and promote equal rights by lawful and peaceful means for black, Mexican-American and other minority-American citizens.

The National Association for the Advancement of Colored People, the National Urban League, The Southern Christian Leadership Conference, the Mexican-American Legal Defense and Educational Fund, and the National Council of Negro Women, are united by the harsh reality that capital punishment has become reserved almost exclusively for our nation's minorities.

The National Association for the Advancement of Colored People (NAACP) has a membership of 470,000 black and white belonging to 1,700 branches and offices throughout the nation. Since its inception in 1909, the NAACP played a key role in securing legislation providing additional enforcement machinery to deal with extra-legal forms of capital punishment and bigoted lawlessness. It has also sought to end racial discrimination, through our judicial system in all aspects of American life. Complementing the Association's legal spearhead are extensive programs to deal with racial factors in housing, education, employment, voter registration, and the administration of criminal justice.

The National Urban League, founded in 1910, is an interracial, non-partisan, non-profit organization. A national movement with over 98 autonomous local affiliates, the National Urban League seeks social and political equalization through channeling contributions received, to innovative

rojects designed to free blacks and other minorities from oor economic opportunities and unfair law enforcement.

The Southern Christian Leadership Conference (SCLC) as founded in 1957, and Dr. Martin Luther King was its rst President. Since its inception, SCLC's fundamental urpose has been the obliteration of all vestiges of racial partheid relying primarily on creative conflict-resolution nerated by non-violent techniques. Programs of SCLC nclude voter registration, increased participation of blacks n economic institutions ("Operation Breadbasket") and rojects aimed at the elimination of poverty.

Founded in 1967, the Mexican-American Legal Defense nd Educational Fund (MALDEF) is devoted to securing he constitutional rights of Mexican-American citizens hrough concerted effort in the courts and by preparing oung Mexican-Americans for legal careers . . . Since its nception four years ago, MALDEF has handled, through s four branches 90 per cent of the civil rights litigations ndertaken in behalf of Mexican-Americans.

The National Council of Negro Women began in 1935, ow includes a coalition of 25 national organizations and ncerned individuals; forming a network affiliating it with bout four million women throughout the United States. ts one hundred and thirty-seven (137) sections are in-olved in innovative program approaches to chronic depri-ation and need by supporting black women to conduct ousing, day-care, drug addiction, and self-help economic rojects, sponsored by the National Council.

Past statements and resolutions adopted by these organi-ations reflect the united interest of the parties participat-g in this brief. Addressing itself to the discriminatory pplication of capital punishment, the 1969 resolution by e Board of Directors of the National Urban League ated:

"There seems little question that the death pen
has been applied in a discriminatory fashion.
black and the poor suffer the extreme consequenc
numbers far out of proportion to their rates of cr
. . . Since 1930 of the nearly 4,000 persons execu
fifty-five (55) percent have been black, although
groes make up only eleven (11) per cent of our po
lation. Almost without exception, the victims of ex
tion have been poor. Statistics indicate that discri
nation because of race is rampant and the death pen
applied most often in instances of crimes by Negr
against whites. It is all too often the poor, the w
the ignorant and the black who have been execut

From the facts at hand they were led to conclude:

"Since we are convinced that the death penalty f
in its deterrent role; is patently unfair and discri
natory as applied to the poor and the black; dist
our legal system and the psychology of our nati
and may, in fact, be in violation of the Constitut
the National Urban League ardently endorses and
ports all efforts to have this most extreme form
punishment abolished."

In re-acknowledging the commitment of the Associa
against the imposition of capital punishment the 61st
nual Convention of the NAACP resolved:

"Whereas, the Constitution of the United States
America guarantees all persons without regard to r
color, creed or national origin equal protection u
the law,

Whereas, the sad facts of past and recent his
clearly demonstrate that the vast majority of pe

who have received the death penalty or are presently held in death row are blacks,

Whereas, many not so held in death row or in other facilities for crimes for which they were convicted by juries that did not in fact have representatives of that person's peer group.

Be It Therefore Resolved, that the National Office use its prestige and resources to press for the Supreme Court of the United States to abolish the death penalty as cruel and inhuman punishment violative of the equal protection clause and therefore unconstitutional."

Speaking in behalf of Mexican-Americans, caught in the criminal process, Mario G. Obledo, General Counsel for the Mexican-American Legal Defense and Educational Fund (MALDEF) has stated:

"Maldef believed that Mexican-Americans, particularly in the Southwestern United States, receive and have received the death penalty in greater frequency for similar crimes than their Anglo or White counterpart. Maldef is deeply concerned that the administration of justice system is depriving the Mexican-American of basic constitutional rights. The last man to be executed in the United States was a Mexican-American."

SCLC's position against capital punishment is related to its unique national reputation for steadfast espousal of non-violence for individuals and the State; its former leader, Dr. Martin Luther King was a victim of a modern style lynching while he was in the pursuit of the Ghandian ideals.

SCLC has not been deflected from its committment to the non-violent philosophy even in the case of Dr. King's death. On the occasion of the conviction of James Earl Ray for

the assassination of Dr. King, Mrs. Martin Luther King stated on behalf of the organization: "The death penalty for the man who pleaded guilty to the crime would be contrary to the deeply held moral and religious convictions of my husband and the present President of SCLC, Dr. Ralph D. Abernathy . . . Retribution and vengeance have no place in our beliefs."

The individual petitioners before this Court are engaged in a grim struggle for their lives and will undoubtedly seek to explore every facet of their case before this Court and any other public body or official whose actions may spare them. The undersigned, however, through their long, unceasing and continuing fight to erase the stain of racism from America, have a broader and more protective concern, for they speak not only on behalf of the instant petitioners, all of whom are black, but for the disproportionate number of disadvantaged minority group members who will in the future, if the past is any predictor, face the ultimate penalty.

It is only through organizations such as the undersigned that ethnic groups who have been peculiarly subjected to discrimination, but who still look to the constitution to protect their young from an unjust penalty, can have *their* day in Court, to state what *they*—who have been subjected to much of this society's inhumanity—believe are minimal standards for civilized administration of criminal justice. The undersigned organizations, because of their unique goals, have a special responsibility to place the death penalty before this Court within the full context of the struggle for racial justice.

Summary of Argument

I.

The total history of the administration of capital punishment in America, both through formal authority, and informally, is persuasive evidence, that racial discrimination was, and still is, an impermissible factor in the disproportionate imposition of the death penalty upon non-white American citizens.

II.

A. The available social science data is sufficient to substantiate the assertion that the death penalty is discriminatorily imposed in contravention to the Equal Protection Clause of the Fourteenth Amendment. However, where an inference exists that an impermissible factor is a basis for the imposition of the death penalty, the burden shifts to the state to refute that inference. To take a life, without refutation of that impermissible factor is inconsistent with the "cruel and unusual punishment" clause of the Eighth Amendment.

B. In view of the trend away from the imposition of formal and informal punishment on alleged black offenders, any lingering executions which "prima facie" have been affected by racial discrimination, violate contemporary American standards for civilized criminal justice; thereby constituting cruel and unusual punishment.

I.

Pre-1935 History of the Racially Discriminatory Use of Formal and Informal Capital Punishment by Whites Against Non-Whites.

A. *Slavery 1619-1865.*

The Court is faced with the ultimate in the use of public authority over its citizens—four black defendant's lives hang in the balance. The amici curiae, wish to place the penalty predicament of these four defendants within the total historical context of the infliction by whites of punishment upon non-whites, both through the formal public authority, and informally, in an attempt to assert that the contemporary phenomenon, capital punishment, is merely the grossest (because irremediable) and contemporary evidence, of continued racial discrimination operating to impose heavier burdens on the non-white population in the criminal process.

No attempt will be made here to focus on unprovoked, near-genocidal behavior, such as that which occurred in crossing the Atlantic during the slave trade,[1] or the near extinction of the American Indian due to systematic forays by white settlers on the western frontier. Nor will we cover the black fatalities due to white inflicted race riots, where the black victims were largely the by-product of general random violence, which, as they progressed, became hysterical reactions and not responses to specific offenses. We will concentrate on that form of racial hos-

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[1] Accurate figures with respect to the total number of slaves imported to the country do not exist, but estimates range up to fourteen million. "From Slavery to Freedom—a History of Negro Americans", pages 58-59, 3rd Edition (1966), John Hope Franklin. It has been further estimated that one-third of the blacks taken in Africa died on the coast and another third in crossing the ocean. "Slave and Citizen", pages 28-29 (1947), Frank Tannenbaum.

tility, approved or by the white majority, which controlled the dispensation of fatal penalties for alleged perpetrators of crime.

The most brutal and inhumane forms of punishment—crucifixion, burning and starvation—were legal under the slave codes in the early colonies and were used extensively because imprisonment would have been a reward, giving the slave time to rest, and fines could not be collected from unpaid laborers.[2] While one would imagine that the fact that the slave was conceived of as primarily an economic unit would make him totally immune to capital punishment, in fact, he was exposed to a higher liability than non-slaves in this regard under formal statutes:

> "State criminal codes dealt more severely with slaves and free Negroes than with whites. In the first place, they made certain acts felonies when committed by Negroes; and in the second place, they assigned heavier penalties to Negroes than whites convicted of the same offense. Every southern state defined a substantial number of felonies carrying capital punishment for slaves and lesser punishments for whites. In addition to murder of any degree, slaves received the death penalty for attempted murder, manslaughter, rape and attempted rape upon a white woman, rebellion and attempted rebellion, poisoning, robbery, and arson. A battery upon a white person might also carry a sentence of death under certain circumstances." [3]

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[2] "The Suppression of the African Slave Trade to the United States of America", page 6 (1954), W. E. B. du Bois.

[3] "The Peculiar Institution—Slavery in the Ante-Bellum South", page 210 (1956), Kenneth M. Stamp.

This pervasive authorization of capital punishment was, ironically, due to the fact that the slave trade was so thriving; often the masters of the slaves were so largely outnumbered that there was always the fear of violent rebellion.[4] The intense fear of violent reaction by blacks had its roots in the real security problems of the slave owners, but it has spread to the general populace in the South and to the North as blacks migrated and has had a continual impact on the white public's view of blacks charged with crimes against whites.

Capital punishment was also freely authorized for whites who interfered with slave discipline. North Carolina made death the penalty for concealing a slave "with the intent and for the purpose of enabling such slave to escape," and Louisiana made it a capital offense to use "language in any public discourse, from the bar, the bench, the stage, the pulpit, or any place whatsoever" that might produce "insubordination among slaves." The only brake on the actual imposition of capital punishment was the interest of the slave-owner in maintaining continuing production, but encouragement to use the penalty for slaves seen as particularly obstreperous existed by way of reimbursement of the owner for any slaves so disposed of.[5] Further, formal capital punishment was not needed to control slave rebellions for these were largely responded to with

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[4] Indeed, this appears to be the prime factor in abatement of the slave trade after the Eighteenth Century. This attests to the intensity and depth of the fear of blacks—because slavery was highly profitable for the whites involved. "The Suppression of the African Slave Trade", *supra*, p. 6.

[5] "White Over Black", p. 106 (1968), Winthrop Jordan.

immediate and ruthless counter-violence on the spot.[6] Such was the formal, explicit utilization of capital punishment during the slavery period—a use which was totally unrelated to the gravity of the crime, dangerousness of the offender, or any of the other oft asserted, superficially plausible justifications for the death penalty. The prime and express purpose of capital punishment in this context was to maintain the maximum threat for any reaction against the caste-like slave system.

B. *Lynching and Vigilantism 1882-1935.*

Immediately after slavery, when the freed men in the South came into economic competition with the white poor, and no longer could rely on the protection of their lives by white plantation owners, violence in the form of lynching—the informal mob resort to summary capital punishment for real or alleged crimes—increased sharply in severity:

> "From 1882 to 1903 the staggering total of 1,985 Negroes were killed by Southern mobs. Supposedly the lynch-mob hanging (or, too often, the ghastly penalty of burning alive) was saved for the Negro murderer or rapist; but the statistics show that Negroes were frequently lynched for lesser crimes or in cases where there was no offense at all or the mere suspicion of one. Lynch-mob violence became an integral part of the post-Reconstruction system of white supremacy." [7]

During this period 1,169 whites were also lynched, but the proportion of non-whites was approximately 60% of the

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[6] "Violence in America—Historical and Comparative Perspectives—a Staff Report to the National Commission on the Causes and Prevention of Violence", p. 39, Vol. I (1969), Hugh Graham & Ted Gurr.

[7] "Violence in America", Vol. I, page 38.

total [this includes 108 non-whites who were not black], a figure roughly paralleling the 53% of non-whites executed by way of capital punishment post-1930.[8]

Between 1903 and 1935, it has been estimated that an additional 1,015 blacks were lynched by white mobs. These figures do not include kangaroo court actions, unreported murders, or blacks killed in race riots.[9] It is clear, however, that by 1935 the recorded and easily identifiable lynchings were sharply in abatement. From a high of 130 killed in 1901,[10] and 70 in 1918,[11] lynching became almost non-existent, with 2 killed in 1950, 1 in 1951 and 1 each in the years 1957 through 1959.

We have been using the term "lynching" primarily based on the definition by the recent Violence Commission Reports; "The practice or custom by which persons are punished for real or alleged crimes without due process of law . . . an unorganized, spontaneous, ephemeral mob which comes together briefly to do its fatal work." Other non-white ethnic groups have been murdered primarily by another form of white lawlessness, namely Vigilante violence, a more organized and systematic usurpation of the functions of law and order. It was supported often by men occupying the high office of Senator and Congressman, and, when not being used to check horse thievery, it was used for racial intimidation of Mexican-Americans, Chinese and Indians.[12]

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[8] "Violence in America", Vol. I, *supra*, p. 57, footnote 27.

[9] "Violence in America", page 344, Vol. II (1969).

[10] "Race Relations and American Law", page 320 (1959), J. Greenberg.

[11] "Report of the National Advisory Commission on Civil Disorders", page 102 (1968).

[12] "Violence in America", Vol. I, *supra*, footnote, pages 40, 52.

"Not unmixed with vigilantism is frequently a fair share of racism, which has its own curious history on the American frontier. In some ways the frontier was the freest of places in which a man was judged on the quality of his work and his possession of such abstractions as honesty, bravery, and shrewdness. The Chinese merchant, the Negro cowboy, the Indian rider—all were admired because of what they could do within the frontier community and not because of their pigmentation. On the other and, the only good Indian was a dead Indian, 'shines' could seldom rise above the worker level, and 'coolies' were something to take potshots at without fear of retribution, either civic or conscience. Just as lynching a Negro in parts of the South was no crime, so shooting an Indian or beating an Oriental or a Mexican was equally acceptable. Like all societies, the frontier had its built-in contradictions." [13]

II.

The Disproportionate Numbers of Non-White Persons Executed by Formal Capital Punishment Constitutes Cruel and Unusual Punishment in Violation of the Eighth and Fourteenth Amendments of the Constitution.

The above material now brings us down to 1930, which is the earliest date for which statistics are available on persons executed after a formal trial. It is the thesis of this brief that this Court must evaluate the constitutional question of the arbitrary application of the death penalty within the context of prior history of official and non-official racial violence, and that the figures on capital punishment post-1930 can only be explained as a residual end product

[13] "Violence in America", Vol. I, *supra*, footnote, page 105.

of the prior practices of meting out the severest penalty on racial grounds. The capital punishment statutes under slavery would, by today's standards, clearly be unconstitutional, both as a denial of equal protection of the laws and as cruel and unusual punishment under the Federal Constitution. The Civil War has precluded that question from reaching this Court, but we see that historically, lynching and vigilantism, while technically not authorized by State statutes, historically performed the same function of domination and subjection on nonwhites by a white majority. When lynching and vigilantism were subsiding, the white-initiated race riot continued to play the lawless function of intimidation by fatalities in the early 1900's. [In time, that form of technically unapproved mass execution fell rapidly into disuse, but it is unbelievable that a society with such a history of ingrained and widespread use of violence against nonwhites as a prime reaction to perpetration of crime, could suddenly cease injecting racist considerations into the formal administration of justice.] It must be noted that all social science examination of the extent and depth of racial hostility by whites against nonwhites have reported that it has been pervasive and intense,[14] and as late as 1968, the National Advisory Commission on Civil Disorders could conclude:

> "Our Nation is moving toward two societies, one black, one white—separate and unequal." [15]

But the fact of the historical continuity need not rest on assertion of generalized racism in American society, for the current data creates the clear, to date, unrefuted inference that disproportionate imposition of the death penalty upon

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[14] See generally, "An American Dilemma", Myrdal, G.

[15] Report of the National Advisory Commission on Civil Disorders, page 1.

blacks and other minorities is a function of racial discrimination.

Based upon statistics compiled by the Federal Bureau of Prisons, 3,859 persons were executed in this country between 1930-1968. Of these 2,066 were blacks; 1,751 were whites and 42 were of other minority groups.[16] Proportionately, more than one half of the prisoners executed in this country were black during a period in which blacks constituted less than one tenth of the nation's population. More persuasive however, are the figures of persons executed for rape and murder. Of the 3,334 persons executed for murder, almost one half, 1,630 were blacks. Shocking however, is the fact that 1,231 of the blacks executed for murder were from the South.[17]

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[16] The figures below illustrate the racial composition of the prisoners executed between 1930-1967:

	Black	*White*	*Other*	*Total*
Rape	405 (89.0%)	48 (10.6%)	2 (0.4%)	455 (100%)
Murder	1630 (48.9%)	1665 (49.9%)	40 (1.2%)	3334 (100%)
Other	31 (44.3%)	39 (55.7%)	0 (0.0%)	70 (100%)
Total	2066 (53.1%)	1751 (45.4%)	42 (1.1%)	3859 (100%)

[17] The following is a breakdown by region, of prisoners executed for crimes of murder and rape, 1930-1968; 98% of the executions in the U.S. were for rape and murder.

Region	*Murder* *Total*	*White*	*Black*	*Other*	*Rape* *Total*	*White*	*Black*	*Other*
Northeast (9 States)	606	422	177	7	–	–	–	–
Northcentral (12 States)	393	254	137	2	10	3	7	–
South (16 States)	1,824	585	1,231	8	443	43	398	2
West (13 States)	496	393	82	21	–	–	–	–
Federal	15	10	3	2	2	2	–	–
Total	3,344	1,664	1,630	40	455	48	405	2

Equally as significant are the rape statistics, nationally 455 persons were convicted of rape. Of these 405 or 89% were black. As the figures indicate below, 443 convicted rapists were executed in the South, of these 398 were black.

Although the foregoing statistics give the overall impression that racial discrimination in the United States is the root cause of the disproportionate imposition of the death sentence on blacks and other minority groups, a systematic and extensive examination of differentials in capital sentencing was undertaken in the summer of 1965 by Dr. Marvin Wolfgang, a professor of Sociology at the University of Pennsylvania.[18] Briefly, the study was a survey of rape convictions during the period 1945-1965 of nineteen randomly selected counties in the State of Arkansas. The study compared the rate of death sentencing for black and white defendants all of whom were convicted of the crime of rape. The approach was to develop a "null hypothesis" that there is no difference in the distribution of the sentence of death or life imprisonment imposed upon black and white defendants. The principal variables considered were the race of the defendant, of the victim, and sentence. However, other data ranging from family status to circumstances at the trial were gathered and analyzed. From the Arkansas data, and his survey, Dr. Wolfgang concluded "that Negro defendants who rape white victims have been disproportionately sentenced to death by reason of race during the years 1945-1965 in the State of Arkansas."

The Wolfgang survey, although limited to the crime of rape, clearly substantiates the fact that the death penalty has been discriminately applied over the years in those states which retain the death penalty.

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[18] Dr. Marvin Wolfgang's study was extensively reviewed and discussed in *Maxwell* v. *Bishop*, 398 Fed. 138.

The above data confirms the hypothesis of the amici curiae, especially with respect to the data drawn from the South, that current figures showing the large proportion of nonwhites who were executed is merely the present phenomenon of racial discrimination being exercised against the nonwhite. Slavery was exclusively a Southern phenomenon, lynching was primarily a Southern phenomenon, and the general data with respect to all crimes, and particularly the crime of rape,[19] indicates that the South has been the prime contributor to the disproportionate application of the death penalty to blacks. If this data is coupled with other material showing the explicit Southern legisla-

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[19] The history of the South's use of the death penalty in rape cases during the period preceding the civil war, unmistakably shows the original official empathis for this region's discriminatory application of capital punishment. Of 15 jurisdictions which had separate penal laws for free persons and for slaves, in 9 jurisdictions (Alabama, District of Columbia, Georgia, Kentucky, Mississippi, Missouri, [the mandatory penalty for blacks was not death, but castration], Tennessee, Texas and Virginia). Rapes committed by whites were not punishable by death, while in the cases of rapes or attempted rapes upon white women committed by black men, the death penalty was mandatory. In Louisiana and Maryland the crime of rape committed by whites was punishable by death or terms of imprisonment, while in the case of blacks the death penalty was mandatory for the crime of rape or attempted rape upon a white woman. In the four remaining jurisdictions, Arkansas, Florida, North Carolina, and South Carolina, assault with intent to commit rape upon a white woman was a capital offense for a black man, but not for a white man. It is to be noted that in every jurisdiction but the District of Columbia and Mississippi, the statutes imposing more severe penalties for the crime of rape, or attempted rape, or assault with intent to commit a rape not only applied to slaves, but also expressly applied to "free persons of color", furthermore, in each one of the 15 jurisdictions the death penalty was mandatory (except in Missouri where the mandatory penalty was castration), for the crime of *attempted* rape upon a white woman by a black man, in none of these jurisdictions punishable by death if committed by a white man upon any woman, white or black, nor was that crime punishable by death if committed by a black man upon a black woman. The source of the above summary is included in Appendix A.

tion excluding blacks from juries[20] and, where that
longer obtained, the racial exclusion of blacks in admini
tration of jury selection,[21] we know that the capital pu
ishment figures are explained in part by the fact that t
bulk of the white population from 1930 through the 50's h
not totally expunged its racial prejudice, and was probab
allowing the race of the defendants to affect their jud
ment. It is precisely because of this phenomenon that so
of the amicus curiae have worked actively to reverse t
trend of the exclusion of non-whites from juries. To vo
to put a man to death requires the juror to place so
distance between himself and the defendant, and this pro
ess is facilitated if he can, because of some perception
the defendant, dehumanize him—racial prejudice can pl
exactly that function.

Amici curiae submit that the above data is sufficient
raise a claim on behalf of the instant petitioners that t
application of the death penalty has been discriminato
and violative of the equal protection clause of the Feder
Constitution. However, because some experts have que
tioned the definitive and conclusive nature of the dat
showing the role race has played in the application of t
death penalty, amici curiae assert that the cruel and u
usual punishment provisions of the Federal Constitution a
flexible enough to sustain this Court in voiding the dea
penalty in its present state of application on the basis
two propositions: (1) that where a defendant faces
irreversible penalty, and creates, through maximum deve
opment of contemporary social science data within his li

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[20] See, e.g., *Strauder* v. *West Virginia*, 100 U.S. 303 (1879).

[21] Race Relations in American Law, *supra*, footnote —, pp. 3
328.

[22] The Death Penalty In America (paperback edition), (p
411-413).

ited resources, an inference that an impermissible factor has controlled or modulated the imposition of such penalty, the burden shifts to the State to refute that inference, and in lieu of such refutation, it is cruel and unusual punishment to put the defendant to death. (2) The current trend of white imposition of formal and informal punishment on alleged black offenders shows a movement away from explicit, and lawless racial violence, a progressive reduction of the factor of race in meting out formal punishment such that any lingering executions which prima facie have been affected by race, would violate contemporary American standards for civilized criminal justice and constitute cruel and unusual punishment.

The cruel and unusual punishment provisions of the Eighth Amendment to the United States Constitution can best be described as dynamic, subject to interpretation based on the realities as existing in society, and the state of men's minds when its interpretation is before the Court. This Court has long ago acknowledged that great "difficulty would tend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishment shall not be inflicted." *Wilkerson* v. *Utah*, 90 U.S. 130, 135-136, 25 L. Ed. 345 (1878). Despite the difficulty in interpreting the "cruel and unusual punishment" clause this Court in *Weems* v. *United States*, 217 U.S. 399, 30 S.Ct. 544 (1910) held that a section of the Philippine Legal Code which imposed punishment disproportionately to the crime was likewise violative of the cruel and unusual clause. The Court clearly stated that the definition of cruelty shall be governed by the "contemporary standards." In *Weems*, the Court stated: "the clause of the Constitution in the opinion of commentators, may be therefore progressive and is not fashioned to be obsolete, but may acquire meaning as public opinion becomes enlightened by humane justice" 217 U.S. at 378. In *Trop* v.

Dulles, 356 U.S. 86, 78 S.Ct. 90 (1958), the Court in holding that de-nationalization for wartime desertion was cruel and unusual punishment, reaffirmed the "flexibility" of the Eighth Amendment as stated in *Weems*, and provided a new formula. It stated: "The Amendment must draw meaning from the evolving standards of decency that mark the progress of a maturing society," 356 U.S. at 101, 78 S.Ct. at 598.

Amici curiae assert that the clear sweep of American history, running from the period of slavery through the extra-legal and racially motivated lynchings, vigilantism and race riots shows an unmistakable and contemporary trend toward disuse and relinquishment of race as a basis for taking a man's life. White America has released its blacks from their status as slaves who faced official discriminatory application of the death penalty. There is no more Western frontier to conquer to act as the excuse for extermination of additional American Indians. Whites no longer organize vigilante parties against the rest of its Spanish-speaking and Oriental population: and, they have given up taking to the streets to murder blacks in race riots. It is true that white Americans left the street and entered the jury box to continue to exercise their racial animosity, but even this phenomenon has been on the decrease as the jury population recoiled from the application of capital punshment in general. From 1940 through 1960 more blacks were executed than whites each year. From 1951 to 1961, a higher number of blacks than whites were executed for 7 of the 10 years. Since 1962 there has been a reversal in this trend and for 5 of the 6 years more whites were executed than blacks, and in the last year (1967) the executions were even—1 white and 1 black.[23]

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[23] National Prisoner Statistics (1968), p. 7.

Racism, from which many receive concrete economic benefits and psychic sustenance, subsides with great resistance—especially given the current attempts by irresponsible politicians to revive fears in the white populace of the "black rebel" with the code words of "Law and Order." There is, however, some indication, that white America regardless of the continued racial discrimination in many facets of American life, desires,—at least with respect to capital punishment,—not to take a man's life simply because the color of his skin differs from theirs. It remains only for this Court to validate that direction.

We re-assert that this Court may find the continued application of the death penalty within the American context, as cruel and unusual punishment without a finding that race has controlled the death decisions to a statistical certainty. It need only find that the defendants have marshalled enough evidence, within the available social science data bearing on the subject, to create an inference that race has affected the application of the death penalty to the overwhelming number of men now on death row and that to execute the defendants under this state of the evidence is cruel and unusual punishment. We hasten to remind the Court that the overwhelming number of non-whites in this country, Indians, Black, Puerto Ricans and Mexican-Americans are poor, and that another inference created by the current social science data is that the class of the defendant, again an irrelevant factor in any rational criminal law system, may be a contributing element to their receipt of the death penalty. Another clear and unmistakable contemporary standard which this Court has consistently, and with elaboration begun to announce is that the indigency of a defendant should not be allowed to affect the outcome in a criminal prosecution. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Douglas* v. *California*, 372 U.S. 353 (1963). This standard should

reinforce the holding which amici curiae argue for, namely that defendants' inability, due to their indigency and consequent lack of resources, to produce statistically certain proof of the discriminatory application of the death penalty cannot be allowed to cause their deaths. To place a burden of proof on indigent defendant beyond that which he has resources to sustain,[24] especially where he has established a prima facie case that an irreversible penalty will be applied to him unconstitutionally, is itself cruel and unusual punishment. This Court can legitimately take the small step of merging its evolving protection for blacks and indigents under the equal protection clause, with the announcement of this minimal civilized standard for controlling the ultimate penalty available in a criminal justice system. To look back twenty years from now when the statistical data is in an even more developed shape and to find that post 1971 men had still been put to death for being non-white, and not possessed of sufficient resources to give further proof of it, would be a travesity of justice.

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[24] There is also some serious question as to whether any defendant, even with unlimited resources, could offer proof beyond that which is current that the death penalty has been applied discriminatorily. Record keeping has varied over the years, trial transcripts do not reveal all the pertinent data. If proof of past jurors' subjective state of mind were required, that would be impossible. The vast number of variables which impinge upon any complex human behavior make it difficult to isolate one as a single causative factor in explaining any human event. But where the cost to the defendant is so total, and the interest of the State so minimal, the Court must find some formula for giving credence to maximum amount of information which defendant facing terminal penalty could produce, given the inherent compromises on ideally definitive data.

CONCLUSION

ital Punishment clearly violates the equal protection
of the Fourteenth Amendment, and the cruel and
al clause of the Eighth Amendment, it should on
asis be ruled unconstitutional.

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Appendix A

Pre-Civil War History of Punishment for Rape in Southern States and Washington, D.C.

ALABAMA

whites: An act of 1802 provided that rape shall be punished by death. Harry Toulmin, Digest of the Laws of the State of Alabama 207 (1823). In 1841, the punishment for rape was changed to life imprisonment. C. C. Clay, Digest of the Laws of the State of Alabama 414 (1843).

slaves, free negroes, and mulattoes: An act of 1814 provided that a slave convicted of an attempt to rape a white woman shall suffer death. Harry Toulmin, Digest of the Laws of the State of Alabama 185 (1823). The 1841 Penal Code of Slaves and Free Negroes provided that a slave, free negro or mulatto convicted of the crime of rape upon, or an attempt to rape upon, a white woman shall suffer death. C. C. Clay, Digest of the Laws of the State of Alabama 472 (1843).

ARKANSAS

whites: The punishment for rape is death. Act of Dec. 14, 1842 in Josiah Gould, A Digest of the Statutes of Arkansas 334 (1858).

negroes and mulattoes: The punishment for rape is death; the punishment for attempted rape of a white woman is death. *Id.* at 335.

DISTRICT OF COLUMBIA

whites: A Code of Laws for the District of Columbia published in 1819 by the Judges of the Circuit

Court and the Attorney for the District of Columbia, who had been authorized by Congress to prepare a code of jurisprudence for the District, recommended that free persons convicted of the crime of rape be punished with two to twenty (20) years of imprisonment. This Code was not adopted. W. Cranch, Code of Laws for the District of Columbia 235 (1819).

A Penal Code published by order of the Senate on February 28, 1833, provided that rape was punishable by life imprisonment. A System of Civil and Criminal Law for the District of Columbia 367 (1833).

The penal law in effect in 1857 provided that rape of a man's daughter or sister shall be punished by life imprisonment and rape of any other woman or child shall be punished by five to twenty (20) years imprisonment, for the first offence, and life imprisonment for the second offence. Revised Code of the District of Columbia 518-519 (1857). An assault with intent to commit a rape was punishable by three (3) to fifteen (15) years imprisonment. *Id.* at 58.

slaves: The punishment for attempting to commit a rape upon a white woman is death. Worthington G. Snethen, Black Code of the District of Columbia 18 (1848).

FLORIDA

whites: The punishment for rape is death. Act Feb. 10, 1832, §2 in Leslie A. Thompson, Manual or Digest of the Statute Law of the State of Florida 490 (1847).

slaves, free negroes, or mulattoes: An act of 1828 provided that any negro or mulatto who assaults a white woman or child with intent to commit a rape shall be cropped, branded or suffer death, at the discretion of the court. Acts of the Legislative Council of the Territory of Florida, 1827-8, 109 (1828). An act of 1840 provided that the punishment for rape or assault with intent to rape a white woman shall be death. Act March 2, 1840, §2 in Leslie A. Thompson, Manual or Digest of the Statute Law of the State of Florida 538 (1847).

GEORGIA

whites: Punishment for rape is imprisonment at hard labor for not less than seven nor more than sixteen years. Lucious Q. C. Lamar, Compelation of The Laws of Georgia 552-1821. In 1816, the penalty for rape in the penal code was changed to imprisonment for not less than two nor more than twenty years, and a section was added punishing attempted rape by imprisonment by for not less than one nor more than five years.

Lamar, supra p. 571.

Between 1816-1861 a rape by a white person upon a free white female remained punishable by imprisonment for no less than two, nor more than twenty years; rape upon a slave or free person of color was made punishable by fine and imprisonment at the discretion of the Court.

An assault with intent to commit rape remained punishable with one to five years of imprisonment. Clark, Cobb, Irwin, Code of The State of Georgia, Penal Code, §§ 4248-4250, p. 824 (1861).

slaves, free negroes: In 1816 the punishment for th crime of rape or attempted rape of a free whit female was death. Lamar, supra, p. 804.

Between 1816-1861 rape upon a free white femal remained punishable by death. Attempted rap upon a free white female was punishable by deat or such other punishment as the Court might pre scribe. Clark, Cobb, Irwin, Penal Code For Slav and Free Persons of Color, §§ 7704, 4708, page 91 (1861).

KENTUCKY

whites: An act passed in 1798 provided that rape shal be punished by imprisonment for four to twenty one (21) years. Morehead and Brown, Digest o the Statute Laws of Kentucky, Vol. II, 1265 (1834) In 1801 the penalty for rape was changed to im prisonment from ten to twenty-one (21) years. *Id* at 1269. In 1813 an act was passed which mad rape "upon the body of an infant under the ag of twelve years" punishable by death. Littell an Swigert, Digest of the Statute Law of Kentucky Vol. II, 1009 (1822).

The Revised Statutes of Kentucky in force from July 1, 1852, and published in 1867, retain the death penalty for a rape upon an infant under the age of twelve years. Richard H. Stanton, Revised Statutes of Kentucky, Vol. 1, 379 (1967). Rape of a white woman is punishable by imprisonment from ten to twenty years, the same punishment applies to carnal knowledge of a white girl under the age of ten years. *Id.* at 379-80.

slaves and free negroes: The act of 1801 provided that slaves shall be punished by death for rape com-

mitted upon a white woman. Morehead and Brown, Digest of the Statute Laws of Kentucky, Vol. II, 1282 (1834). In 1811, an attempt to commit a rape upon a white woman by a slave was made punishable by death. *Id.* at 1288.

By 1867, free negroes as well as slaves were punished by death for rape upon a white woman or an attempt to commit such rape, or for being an accessory before the fact to either of these crimes. Richard H. Stanton, Revised Statutes of Kentucky, Vol. II, 375 (1867).

LOUISIANA

whites: A proposed System of Penal Law published in 1833 as a result of a commission from the General Assembly of Louisiana provided that the punishment for rape should be life imprisonment. Edward Livingston, A System of Penal Law for the State of Louisiana 435 (1833).

An act passed in 1855 provided that the punishment for rape shall be death. However, a companion provision gave juries the power to substitute life imprisonment for the death penalty. Acts [1855], Nos. 120, §4 and 121, §25. In 1855, the maximum penalty for assault with intent to commit a rape was two years imprisonment. U. B. Phillips, Revised Statutes of Louisiana 136 (1856).

slaves and free colored persons: An act passed in 1855 provided that slaves and free colored persons shall be punished by death for rape upon or attempted rape upon a white female. Acts [1855] No. 308 §6.

MARYLAND

whites: By an act of 1810, the punishment for r
was death or imprisonment for not less than
year nor more than twenty-one (21) years, at
discretion of the court. Kilty, Harris and W
kins, The Laws of Maryland, Vol. IV, Nov. 1
Ch. 138 §4. In 1860 the punishment for rape
death or imprisonment for not less than eight
months nor more than twenty-one (21) years
the discretion of the court. Scott and M'Cullou
The Maryland Code, Vol. I, 242 (1860). The p
ishment for assault with intent to rape was
prisonment for not less than two nor more t
ten (10) years. Scott and M'Cullough, Revi
Laws of the State of Maryland 209 (1859).

negro or mulatto slave: An act of 1819 made it
lawful for a court to sentence any negro or
latto slave to imprisonment, and in effect m
the death penalty mandatory in case of ra
Kilty, Harris and Watkins, The Laws of Ma
land, Vol. VI, 1818, Ch. 197 §1. For an ass
with intent to rape, the court had discretion, un
the terms of this act, to sentence any slave
be whipped or to banishment from the state.
2. The law in 1860 provided where the punishm
would be imprisonment were the defendant wh
the negro slave shall be sentenced to be sold
of the state for such term as he may have
serve. Scott and M'Cullough, The Maryland Co
Vol. I, 250 (1860). In the case of a free neg
he shall be sentenced to be sold either in or
of the state, at the discretion of the court,
such term as a white man for the same offe
would be sentenced to imprisonment. *Ibid.*

negroes or mulattoes (free or enslaved): In 1859 the punishment for impregnation of a white woman was that he be sold beyond the limits of the state as a slave for life. Scott and M'Cullough, Revised Laws of the State of Maryland 242 (1859).

MISSISSIPPI

whites: An act passed June 14, 1822, provided that the punishment for rape shall be death and the punishment for assault with intent to rape shall be a fine and not more than imprisonment for one year. Revised Code of the Laws of Mississippi, Ch. 54, §§6 and 11, 297, 298 (1824).

In 1839 the punishment for rape was changed to not less than ten (10) years imprisonment. 1839 Laws (Adjourned Session, Jan. 7 to Feb. 16, 1839), Ch. 66, 116. The penal laws were expressly extended to all free persons of color. *Id.* at 190.

By 1857 the punishment for rape had been changed to life imprisonment. Revised Code of the Statute Laws of the State of Mississippi, Art. 218, 608 (1857).

slaves: The act of June 18, 1822, provided that the punishment for an attempt to rape a free white woman or child shall be death. Revised Code of the Laws of Mississippi, Ch. 73, §55, 381 (1824). Slaves were not affected by the act of 1839 which eliminated the death penalty for rape. 1839 Laws (Adjourned Session, Jan. 7 to Feb. 16, 1839), Ch. 66, 190. The Revised Code of 1857 provided that slaves shall suffer death for rape upon or an attempt to rape any white woman, or for having "carnal connexion" or attempting to have "such

connexion" with any white female child under the age of fourteen years. Revised Code of the Statute Laws of the State of Mississippi, Art. 68, 248 (1857).

MISSOURI

whites: In 1818, the law of the Missouri Territory provided that the punishment for rape shall be castration. Henry S. Geyer, Digest of the Laws of Missouri Territory 137 (1818).

In 1825, after Missouri had become a state, rape remained punishable by castration, and an assault with intent to rape was punished by imprisonment for not more than seven (7) years. Laws of the State of Missouri: Revised and Digested, Vol. I, 283 (1825).

In 1835, the punishment for rape was changed to imprisonment for not less than five (5) years. The Revised Statutes of the State of Missouri 170 (1835).

slaves, negroes, or mulattoes: The law of the Missouri Territory punished rape by a slave with castration. Henry S. Geyer, Digest of the Laws of Missouri Territory 158 (1818).

In 1825, the law of the State of Missouri provided that in the case of slaves, rape upon any person, or attempt to commit a rape upon a white woman, shall be punished by castration. Laws of the State of Missouri: Revised and Digested, Vol. I, 283 (1825).

In 1835, when the punishment for rape by whites was changed to a term of imprisonment, rape upon, or an attempt to commit a rape upon, a white fe-

male by any negro or mulatto was made punishable by castration. The Revised Statutes of the State of Missouri 170-71 (1835).

NEVADA

An act passed in 1861 provided that the punishment for rape shall be imprisonment for not less than five years to life imprisonment, and the punishment for assault with intent to rape shall be not less than one nor more than fourteen years imprisonment. Bonnifield and Healy, Compiled Laws of the State of Nevada, 1861-1873, Vol. I 557 (1873).

NORTH CAROLINA

whites: The punishment for rape was death. Revised Statutes of the State of North Carolina, Vol. I, 192 (1837).

"persons of color": The punishment for rape or for an assault upon a white female with intent to commit a rape was death. *Id.* at 590.

SOUTH CAROLINA

whites: An act enacted in 1712 provided that rape shall be punished by death. Thomas Cooper, Statutes At Large of South Carolina, Vol. II, 498 (1837).

slaves or free persons of color: By an act enacted in 1843, the punishment for an assault upon a white woman with intent to rape is death.

TENNESSEE

whites: Rape was punished by imprisonment for not less than ten nor more than twenty-one (21) years. Assault with intent to commit a rape was pun-

ished by imprisonment for not less than two no more than ten (10) years. Meigs and Cooper, Cod of Tennessee 830 (1858).

slaves and free persons of color: Rape upon or a assault with intent to commit rape upon a fre white female, and having or attempting to hav sexual intercourse with a free white female unde twelve years of age, were punished with death *Id.* at 509, 524.

TEXAS

whites: An act of Aug. 28, 1856 provided that the pun ishment for rape shall be not less than five no more than fifteen years imprisonment. Oldhar and White, A Digest of the General Statute Law of the State of Texas, Penal Code Art. 529, p. 52 (1859).

slaves and free persons of color: An act of Feb. 12 1858 provided that the punishment for rape, as sault with intent to rape, or attempted rape upo a free white woman is death. *Id.*, Art. 819 an Art. 823, 562-63.

VIRGINIA:

whites: An act passed in 1819 provided that the pun ishment for rape shall be imprisonment for term not less then ten nor more than twenty-on (21) years. Revised Code of the Laws of Vir ginia, Vol. I, 585 (1819). A Code published i 1860 states that rape is punishable by imprison ment for not less than ten nor more than twenty (20) years. Code of Virginia (2d ed.) 785 (1860)

slaves and free negroes: The act of 1819 provided tha in the case of slaves, the punishment for rape shal

be death and the punishment for attempted rape upon a white woman shall be castration. Revised Code of the Laws of Virginia, Vol. I, 585 (1819). The Code of 1860 provided that in the case of slaves, rape upon or attempted rape upon a white woman shall be punished by death, and in the case of free negroes, rape upon or attempted rape upon a white woman shall be punished by death or by imprisonment for not less than five nor more than twenty (20) years, at the discretion of the jury. Code of Virginia (2d ed.) 815-16 (1860).